Supreme Court, U.S.
FILED

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1994

FRANK HOPPING,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

PETITION FOR WRIT OF CERTIORARI

William R. Pfister
Pfister Law Office
119 Walnut Street
Lawrenceburg, IN 47025
(812) 537-0905

Attorney for Petitioner

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QUESTION PRESENTED FOR REVIEW

Did the Supreme Court of Indiana err in failing to find that the Petitioner was deprived of due process when he was held in contempt of court for making insulting statements to a judge outside of court, with no judicial proceeding pending or in progress, in a summary contempt proceeding before the same judge to whom the statements were made?

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OPINIONS BELOW

The decision of the Supreme Court of Indiana is not yet reported and is set forth in the Appendix at A-1. The opinion of the Court of Appeals of Indiana is reported at Hopping v. State, 627 N.W.2d 875 (Ind. Ct. App. 1994), and is set forth in the Appendix at A-17. The Amended Judgment of Conviction issued by Dearborn County Court Judge G. Michael Witte is set forth in the Appendix at A-33.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257. The final decision of the Supreme Court of Indiana denying the Petitioner's appeal was issued on August 4, 1994.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fourteenth amendment to the United States Constitution states in part:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner, Frank Hopping, was convicted on two counts of contempt on July 8, 1993, arising out of an incident which took place in a hallway and office in the Dearborn County Courthouse in Lawrenceburg, Indiana. Hopping had entered the outer office of Judge G. Michael Witte, a judge of the Dearborn County Court, in order to file seven cases involving the collection of back rent to which Hopping, the owner of rental property, was entitled. Hopping initiated a

conversation with a filing clerk in which he expressed the desire to have all seven cases heard on the same day, a privilege which he knew was extended to the local hospital and physicians. The clerk advised Hopping that he could not have all of the cases heard on the same day, at which time Hopping became irritated and spoke in a loud voice. Hopping was asked to leave the office and sit in the waiting area in the hall while the clerk relayed his request to Judge Witte. Hopping left the office and waited in the hall. Judge Witte refused Hopping's request, telling the clerk that Hopping's cases would not be simple or brief (without any basis for such knowledge). The clerk came back out to the hall and so informed Hopping. This response further angered Hopping. He then followed the clerk back into her office, complaining loudly that he was not receiving the same

treatment as other persons. Hopping told the clerk that he was going to run an advertisement in the local paper which would inform the public about the discriminatory treatment he was receiving from Judge Witte. At this point Judge Witte came out of his office and asked Hopping if he had any property in the county for the purpose of satisfying any slander judgment which Judge Witte might obtain against Hopping. Hopping then threatened to publish allegations contained in affidavits concerning drug use by Witte, stating that the people of Dearborn County had a right to know what type of person they had elected to be a Judge.

Judge Witte then asked Hopping to go into the courtroom. Thinking that the Judge wanted to discuss the problem out of the hearing of the office personnel, Hopping entered the empty courtroom

through the Judge's private entrance. Judge Witte did not immediately follow, but rather went to his chambers to summon the sheriff by telephone and to robe. After waiting an undetermined time, Hopping left the courtroom through the public entrance, went down the hallway to the public entrance to the Judge's office, and seeing the Judge standing there asked him whether he was coming to the courtroom. At this time, and for the first time, Judge Witte told Hopping he was under arrest and ordered him into the courtroom. Within seconds a deputy sheriff arrived and accompanied Hopping into the courtroom, at which time Judge Witte accused Hopping of contempt of court. The record of that proceeding indicates that Hopping and Judge Witte disagreed as to the facts of what had occurred and also reveals that Hopping repeatedly requested an attorney. Judge

Witte denied Hopping's request and summarily found him guilty of direct criminal contempt for what had happened in the Judge's outer office and fixed his sentence at 30 days in the Dearborn County Jail.

After sentence was pronounced, Judge Witte left the bench and was exiting the courtroom through his private door. As the deputy sheriff was taking Hopping from the courtroom through the public entrance, Hopping stated to the deputy sheriff: "Well, I had a lot of friends killed in World War II by the Japanese. It might've been some of his relation, you don't know" (Contempt Hearing at 11-12). Judge Witte, who is of Japanese-American descent, heard the remark and ordered the deputy sheriff to return Hopping to the courtroom where he found him guilty of a second count of criminal contempt and sentenced him to an additional

30 days in jail, to be served consecutively to the first sentence.

On July 16, 1993, counsel for Hopping filed a Petition to Let to Bail on Own Recognizance, plus a Memorandum of Law in Support of Exception to Judgment and Motion to Reconsider and Correct Error and to Rescind and Vacate Judgment and Motion for New Trial. In the Memorandum, Hopping argued that Judge Witte had no authority to conduct a summary contempt proceeding because no court proceeding had been disturbed and presented case law indicating that due process precluded the contempt trial by Judge Witte (App. at A-45 to 47). The motion for release was denied that same day, and as a result Hopping elected to seek relief in the Court of Appeals of Indiana. On July 20, 1993, Hopping filed with the court of appeals a document entitled Petition in the Alternative: (1) Petition for Writ

of Habeas Corpus Based on Invalid and Void Finding of Direct Contempt; (2) Appeal from Denial of Petition to Let to Bail on Own Recognizance; (3) Petition to Review Sentence. On July 22, 1993, the court of appeals granted Hopping's request to be released on bond pending his appeal.

In his Brief of Appellant before the court of appeals, Hopping again raised the issue of the propriety of the summary proceeding, both on statutory and due process grounds (See Statement of Issues Presented for Review in Appellant's Second Amended Brief, App. at A-48 to 52). The court of appeals ruled that Hopping's actions had constituted direct contempt, holding that direct contempt may be punished by summary proceedings in any case in which the defendant commits "any act in the presence of and with knowledge of the court which manifests a disrespect

for and defiance of a court . . . even though it does not disrupt a court proceeding." Hopping v. State, 627 N.W.2d 875, 878 (Ind. Ct. App. 1994). In dissent, Justice Riley argued that the acts of Hopping could not be described as having disrupted a court proceeding, and thus Hopping was entitled to the procedural protections guaranteed in cases of indirect contempt. Id. at 879.

Hopping next appealed to the Supreme Court of Indiana, which ruled that Hopping had committed direct criminal contempt which could be properly adjudicated in a summary proceeding, despite the fact that no court proceeding was involved when the allegedly contemptuous actions took place (App. at A-12 to 13). As in the disposition of the case by the court of appeals, one justice of the supreme court dissented, stating that he would

adopt the opinion of Justice Riley in the court of appeals.

ARGUMENT

THE DECISION OF THE SUPREME COURT OF INDIANA IS IN DIRECT CONFLICT WITH ESTABLISHED RULINGS OF THIS COURT AND OTHER FEDERAL AND STATE COURTS WHICH HOLD THAT THE DUE PROCESS CLAUSE REQUIRES PROCEDURAL SAFEGUARDS IN CHARGES OF CONTEMPT ARISING OUT OF OUT-OF-COURT CONDUCT OR PERSONAL DEROGATORY REMARKS DIRECTED AT A JUDGE.

This Court has, through a series of decisions, established that procedural safeguards are essential in contempt cases in view of the heightened potential for abuse posed by the contempt power. Taylor v. Hayes, 418 U.S. 488, 499-500 (1974); Bloom v. Illinois, 391 U.S. 191, 202 (1968); Sacher v. United States, 343 U.S. 1, 12 (1952); In re Oliver, 333 U.S. 257 (1948); Cooke v. United States, 276 U.S. 517 (1925). While recognizing the right of courts to punish summarily acts

of contempt occurring in open court which have the effect of disrupting courtroom procedure and denigrating the authority of the court before the public, this Court has consistently held that where an immediate punishment of contempt is not required by the circumstances, due process protections must be afforded to one accused of committing contempt.

This principle was plainly set forth in Cooke v. United States, supra. In Cooke, the defendant was an attorney involved in a civil matter who, during a recess in the court proceeding, delivered to the judge's chambers a note which requested that the judge disqualify himself because of alleged prejudice against the defendant's client. The note also insinuated that the judge was not capable of setting aside his personal bias in the matter. Taking the letter as an attack on his integrity, the judge later direct-

ed the defendant to be arrested and, in a summary trial, convicted the defendant of contempt. While agreeing that the note could be construed as contempt of court, this Court nevertheless ruled that the defendant was improperly convicted. In its holding, the Court stressed the distinction between contempts in open court and contempts in other contexts:

> To preserve order in the courtroom for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court, <u>when occurring in open court</u>. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such summary vindication of the court's dignity and authority is necessary.

276 U.S. at 534 (emphasis added). The Court then stated that when contempt is not in open court, there is no such right or reason in dispensing with the necessity of procedural protections because

the need for "penal vindication of the dignity of the court" before the public is not present:

> Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed.

Id. at 536-37.

Moreover, the Court further emphasized in Cooke that where the act of contempt is an attack on the character of the judge, a different judge should hear the contempt action. The Court noted that the exercise of the contempt power "is a delicate one, and care is needed to avoid arbitrary or oppressive conclusions." Id. at 539. This rule of cau-

tion is "more mandatory," the Court held, where the contempt charged "has in it the element of personal criticism or attack upon the judge." Id.

> [W]here conditions do not make it impracticable, or where the delay may not injure public or private right, a judge, called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place.

Id.

These rules, set forth in 1925, have been affirmed consistently by the Court since that time. In In re Oliver, supra, the Court emphasized that the power summarily to punish contempt in open court is "narrowly limited" and reaffirmed the principle that

> due process of law . . . requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and

> call other witnesses in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent "demoralization of the court's authority * * * before the public."

333 U.S. at 275 (emphasis added) (quoting Cooke v. United States, supra, 276 U.S. at 536).

The Court again vindicated the right of a contemnor to an unbiased tribunal in Offut v. United States, 348 U.S. 11 (1954), which involved 12 findings of contempt against an attorney at the close of the trial in which the contemptuous acts occurred. In reversing the contempt citations, the Supreme Court observed that while sitting in judgment on a misbehaving lawyer, "a judge should not him-

self give vent to personal spleen or respond to a personal grievance." Id. at 14.

In Mayberry v. Pennsylvania, 400 U.S. 455 (1971), the Court further clarified the scope of the due process protections required in contempt proceedings, holding that where the accused is charged with contempt arising out of personal remarks directed at a judge, the due process clause of the fourteenth amendment requires that a different judge hear the contempt proceeding, unless to do so would be completely impracticable. In Mayberry, the remarks which were the basis for the contempt action were personal aspersions described as "fighting words," including such phrases as "dirty sonofabitch," "dirty tyrannical old dog," and "stumbling dog," as well as accusations that the judge was running a Spanish Inquisition. Id. at 466. These words were

described as insults "apt to strike 'at the most vulnerable and human qualities of a judge's temperament.'" Id. (quoting Bloom v. Illinois, supra, 391 U.S. at 194). On these facts, the Court concluded that "[n]o one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication," and held that the due process clause required a public trial before a judge other than the one reviled by the contemnor. Mayberry v. Pennsylvania, supra, 400 U.S. at 465-66.

Most recently, in Taylor v. Hayes, supra, this Court noted that "[t]he provision of fundamental due process protections for contemnors accords with our historic notions of elementary fairness," and again held that where the contemnor's acts can be characterized as personal attacks on a judge or where they provoke a judge and so embroil him in controversy

that there was "'such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused,'" then it was mandated by the due process clause that a different judge rule on the accusations of contempt. 418 U.S. at 500-01 (quoting Ungar v. Sarafite, 376 U.S. 575, 588 (1964)). The Court thus held in Taylor v. Hayes that the contemnor in that case was unconstitutionally convicted of contempt arising out of personal remarks directed at the judge during trial and was entitled to have a different judge dispose of the contempt charges.

Under this Court's opinions, therefore, it is plain that the due process clause protects the rights of contemnors against summary proceedings except in very narrow circumstances, not present in

this case. For purposes of contempt proceedings, due process mandates an orderly process including notice, an opportunity to be heard, assistance of counsel, and, in cases which involve personal verbal attacks on a judge, the adjudication of the contempt charges by a different judge.

A review of the facts in this case compels the conclusion that the decisions of the courts below fly in the face of clear Supreme Court precedent. First, the alleged act of contempt which prompted Judge Witte to begin summary contempt proceedings took place not in the court or in the Judge's chambers, but rather in a hallway and outer office. That no court proceeding was affected by Hopping's conduct is shown by the fact that he was subsequently ordered into the empty courtroom by Judge Witte. Depositions of the court employees who were present

show that no one felt threatened or considered their dignity in need of immediate protection. None of the factors which this Court has identified as justifications for immediate, summary proceedings were present. The public was not involved, and there was no basis to believe that summary action was essential to maintaining the dignity of the court in the eyes of the public. Rather, the contempt proceeding was motivated simply by a desire to punish Hopping by a judge who had a history of antagonistic relations with Hopping. This is confirmed by the Judge's own summary of the charges against Hopping, in which he himself stated that

> this judge acted swiftly with a court hearing due to this judge's personal knowledge and experiences with contemner over the past twelve (12) years as being a person known to engage in false, scurrilous, and scandalous attacks upon the judiciary, as well as government and law enforcement officials of

> southeast Indiana. The basis for this personal knowledge is this judge's prior representation of contemner in a legal matter; contemner's personal distribution to this judge of a scandal sheet called "The Voice Against Corruption"; contemner's frequent appearance as a litigant in small claims court; contemner's close association with Millard D. Scudder and a radical, subversive group known as the Citizens Against Corruption; and the fact that contemner's false, scurrilous remarks were quite similar to those made only one week before in a scandalous pleading filed by Millard D. Scudder in cause number 15E01-9306-MC-013, which pleading was stricken from the record and was never available for public viewing.

(App. at A-38 to 39.)

The second allegedly contemptuous remark was made following the contempt proceeding itself and, as with the first statements, had no impact on the public or on the conduct of the court. Of course, the remark would not have been made but for the fact that Judge Witte convicted Hopping in an unconstitutional contempt hearing. Moreover, the remark

concerning Japanese in World War II can only be characterized as a personal attack on the Judge which did not require immediate reprisal and which, as in Mayberry v. Pennsylvania, supra, and Taylor v. Hayes, supra, should have been judged in a contempt proceeding presided over by one other than Judge Witte.

This case thus presented a classic, obvious situation in which the Judge failed "to maintain that calm detachment necessary for fair adjudication." Mayberry v. Pennsylvania, supra, 400 U.S. at 465. The failure of the Supreme Court of Indiana to vindicate and enforce the due process rights of Hopping in accordance with the rulings of this Court brings this case squarely within Sup. Ct. R. 10.1(c), which provides that a writ of certiorari may be granted "[w]hen a state court . . . has decided a federal ques-

tion in a way that conflicts with applicable decisions of this Court."

Moreover, the decision of the Supreme Court of Indiana affirming the use of a summary proceeding against Hopping is in conflict with the decisions of other state appellate courts and federal courts of appeals. See Sup. Ct. R. 10.1(d). For example, in City of Springfield v. Myers, 43 Ohio App. 3d 21, 538 N.E.2d 1091 (1988), the Court of Appeals of Ohio found it "fundamentally unfair" that the defendant was summoned by a judge for a summary contempt proceeding, without the assistance of counsel, for having called the judge a name on a radio call-in show the night before. Although the defendant was not found in contempt of court for having called the judge a name--this comment having been found to be protected by the first amendment--the defendant was held in contempt

for statements made during the hearing itself. The appellate court reversed the conviction on the basis that the totality of the circumstances surrounding the hearing was so unfair as to preclude a conviction for any remarks made during the hearing. 538 N.E.2d at 1095.

Examples of other recent state cases conflicting with the ruling below include Dooley v. District Court In & For Seventh Judicial District, 811 P.2d 809 (Colo. 1991) (although summary contempt power may be used to ensure that disturbances within courtroom do not disrupt proper administration of justice, summary punishment is strictly confined to those instances where contemptuous conduct occurs in open court and is seen or heard by trial judge); In re Marriage of Betts, 200 Ill. App. 3d 26, 558 N.E.2d 404 (1990) (a finding of direct contempt may be made in a summary manner immediately

after the contemptuous conduct if the purpose of imposing sanctions is to restore order in the courtroom or to maintain control over proceedings in the courtroom; due process protects contemnor from summary action before judge to whom contemnor made statements which "left personal stings"); Moffatt by Moffatt v. Buano, 391 Pa. Super. 1, 569 A.2d 968 (1990) (rude personal remark directed at judge in hallway did not obstruct the administration of justice and could not justify a finding of direct summary contempt).

Similarly, federal courts of appeals have followed the principles set forth in the Supreme Court decisions discussed above and are thus at odds with the approach taken by the Supreme Court of Indiana in this case. See, e.g., United States v. Pina, 844 F.2d 1 (1st Cir. 1988) (if judge becomes embroiled in an

on-running controversy with the defendant, due process requires that another judge preside over the criminal contempt proceedings); United States v. Marra, 482 F.2d 1196 (2d Cir. 1973) (procedure for summary criminal contempt deprives contemnor of due process safeguards, and thus its use must be limited so as to prevent demoralization of court's authority before the public); Adams v. McIhany, 593 F. Supp. 1025 (N.D. Tex. 1984), aff'd, 764 F.2d 294 (5th Cir. 1985), cert. denied, 474 U.S. 1101 (1986) (contempt in form of letter sent to judge attacking his ability to rule fairly could not be punished summarily without affording contemnor due process rights); SEC v. Simpson, 885 F.2d 390 (7th Cir. 1989) (summary proceedings appropriate only where disobedience to court's orders threatens to cause breakdown of ongoing proceedings); In re Weeks, 570 F.2d 244

(8th Cir. 1978) (due process was violated when judge conducted summary proceeding and did not permit defendant to obtain an attorney); United States v. Engstrom, 16 F.2d 1006 (9th Cir. 1994) (reversing contempt order issued in summary proceeding on basis that contempt did not pose a threat to ongoing proceedings and prompt action was not required); Sandstrom v. Butterworth, 738 F.2d 1200 (11th Cir. 1984) (trial judge was prejudiced against attorney, and thus sentencing of attorney for contempt clearly denied attorney an unbiased tribunal).

In support of its decision that a summary contempt proceeding by Judge Witte was proper, the Supreme Court of Indiana relied upon three cases from other jurisdictions: Turquette v. State, 178 Ark. 875, 298 S.W. 15 (1927); Mitchell v. State, 320 Md. 756, 580 A.2d 196 (1990); Jackson v. Bailey, 221 Conn. 498,

605 A.2d 1350 (1992). However, these cases are clearly inapposite to the circumstances of this case. Turquette v. State, supra, was decided in 1927 and cannot be considered of precedential value in any due process case. It is worth noting, however, that even in Turquette the judge who was a victim of assault disqualified himself from deciding the subsequent contempt action. In both Mitchell v. State, supra, and Jackson v. Bailey, supra, the summary contempt proceedings were appropriate because the contemnors committed contempt in the courtroom directly following court proceedings.

The decision of the Supreme Court of Indiana has ignored the plain due process requirements imposed by this Court and followed by other state courts and federal courts of appeals. Accordingly, this Court should accept this case for

review in order to impose consistency in the courts regarding due process rights of contemnors and to decide that summary proceedings which do not afford due process rights are never appropriate in cases which involve contempts which do not take place in court.

CONCLUSION

For all of the foregoing reasons, the Petitioner, Frank Hopping, asks this Court to grant his Petition for Writ of Certiorari to the Supreme Court of Indiana.

Respectfully submitted,

William R. Pfister
Pfister Law Office
119 Walnut Street
Lawrenceburg, IN 47025
(812) 537-0905

Attorney for Petitioner

NO.

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APPENDIX

William R. Pfister
Pfister Law Office
119 Walnut Street
Lawrenceburg, IN 47025
(812) 537-0905

Attorney for Petitioner

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OPINION OF THE SUPREME
COURT OF INDIANA

Filed: August 1, 1994

ATTORNEY FOR APPELLANT

William R. Pfister
119 Walnut Street
Lawrenceburg, IN
47025

ATTORNEYS FOR APPELLEES

Pamela Carter
Attorney General
of Indiana

Julia Zandstra
Frazee
Deputy Attorney
General

Office of
Attorney General
Indianapolis, IN
46204

IN THE SUPREME COURT OF INDIANA

FRANK HOPPING,	)	
	)	
Appellant-Defendant,	)	
	)	No. 15S04-9408-
	)	CR-683
v.	)	Supreme Court
	)	
STATE OF INDIANA,	)	No. 15A04-9307-
	)	CR-264
Appellee.	)	Court of Appeals

APPEAL FROM THE DEARBORN COUNTY COURT
The Honorable G. Michael Witte, Judge
Cause No. 15E01-9307-MC-015

ON PETITION TO TRANSFER

DeBRULER, Justice.

Appellant was convicted upon two charges of contempt of court in the Dearborn County Court. The Court of Appeals (First District) affirmed the convictions with one judge dissenting. Hopping v. State (1994), Ind.App., 627 N.E.2d 875. Appellant filed a petition to transfer which we now grant.

Appellant raises multiple issues in support of this appeal which we consolidate and restate as follow:

1) whether his conduct reflected in the record supports the use of summary proceedings and the determinations of guilt; and

2) whether the sentences were an abuse of discretion.

At approximately 11:00 a.m. on July 8, 1993, Judge Witte took the bench in open court and conducted a contempt hearing. The proceeding was duly reported.

Appellant was then present and in the custody of a deputy sheriff. The judge explained to appellant that he faced a direct criminal contempt charge because of his immediately preceding conduct.[1] Appellant had appeared that morning in the office outside the judge's chambers seeking to have the judge's secretary schedule hearings upon seven of his cases on a single day. She said that court policy considered landlord-tenant disputes, like Appellant's, to be contested and did not permit the court to hear more than one contested case per day. when Appellant insisted, she checked with Judge Witte who reaffirmed the court's policy.

---

[1]In cases of direct contempt, we accept as true the statement entered of record by the trial court. Blankenbaker v. State (1929), 201 Ind. 142, 153, 166 N.E. 265, 268. However, we examine the record to determine whether the acts recorded do, in fact, constitute contempt. State ex rel. Stanton v. Murray (1952), 231 Ind. 223, 235, 108 N.E.2d 251, 257.

Upon hearing the Judge's response Appellant became loud and boisterous, insisting in a bullying manner that hearings for his cases be scheduled for the same date. Judge Witte heard the commotion, was interrupted in his conduct of court business, left his chambers, and personally explained the court's policy to Appellant. Judge Witte then asked Appellant to leave, which he refused to do. Appellant threatened to use his filing fee to pay for an advertisement in the local newspaper alleging that Judge Witte was a drug dealer and a drug user and that Appellant had been treated unfairly by court personnel. Angered, the judge said he would sue if such a false accusation were published.

Judge Witte understood Appellant's threat as an attack upon the integrity of the court and an attempt to intimidate the court into granting his demands, and

finally ordered Appellant into the courtroom for a contempt hearing. Appellant went into the courtroom but left, telling the judge that he was a busy man with more important things to do. Deputy Sheriff Michael Horton escorted Appellant back into the courtroom.

Appellant claimed at the hearing that he had not been loud and boisterous, had been provoked, had not asked to see the judge and had received no explanation of the scheduling rule. Judge Witte found Appellant guilty and sentenced him to thirty (30) days in the Dearborn County Jail.

As the deputy sheriff was leading Appellant from the courtroom, Appellant said, "Well, I had a lot of friends killed in World War II by the Japanese. It might've been some of [Judge Witte's] relation, you don't know." Judge Witte, who is of Japanese ancestry, ordered Ap-

pellant returned to his seat in the courtroom and held an additional contempt hearing based on these remarks. Judge Witte offered Appellant the opportunity to respond, retract or apologize but he denied making the statement. Judge Witte found Appellant guilty of a second count of direct criminal contempt and sentenced him to an additional thirty (30) days in jail, to be served consecutively to the earlier imposed sentence.

Appellant claims that the trial court was in contravention of Indiana law in initiating and conducting summary proceedings for direct criminal contempt. He claims that such proceedings are not appropriately employed unless the relevant act was committed in the presence and with the knowledge of the court and disrupted an ongoing proceeding requiring immediate punishment to maintain order in the court and respect for its authority.

In re Marriage of Neiswinger (1985), Ind., 477 N.E.2d 257; Brennan v. State (1961), 242 Ind. 79, 173 N.E.2d 312.

The contempt power encompasses a broad and varied group of actions. Citations for civil contempt are intended to be coercive, while those for criminal contempt, as in this case, are meant to be punitive. Direct contempt involves actions occurring near the court, interfering with the business of the court, of which the judge has personal knowledge. Indirect contempt undermines the activities of the court but fails to satisfy one of the other direct contempt requirements. See generally Cecilia J. McGregor, Use of the Contempt Power, 35 Res Gestae 12 (July 1991).

It is true that this Court has frequently employed phraseology which could be read to indicate that direct criminal contempt requires a finding of disruption

of an actual court proceeding. See Neiswinger, 477 N.E.2d at 261; Brennan, 242 Ind. at 81, 173 N.E.2d at 313. However, while such disruption may be a sufficient condition for a finding of direct criminal contempt, it is clearly not a necessary condition. In addition, in both Brennan and Neiswinger, direct criminal contempt was inappropriate because important information required to support the charges of misconduct was not immediately apparent to the court. Brennan, 242 Ind. at 82-83, 173 N.E.2d at 312-313; Neiswinger, 477 N.E.2d at 260.

The power of Indiana courts to summarily punish for direct criminal contempt, while specified by statute, rests upon the common law. It is inherent in the courts. McIntire v. State (1967), 248 Ind. 142, 144-45, 223 N.E.2d 347, 348-49. It is essential for a court to

be able "[t]o protect itself against gross violations of decency and decorum . . ." as it pursues justice. Brown v. Brown (1853), 4 Ind. 627. Appellant's claim that direct criminal contempt can only occur in the context of a hearing is simply a misstatement of the law. This Court has long recognized that it is not the actual interference with a legal proceeding that is to be prevented, but the undermining of the judicial process. This concern for the integrity of the process has supported findings of direct criminal contempt for merely making contumacious statements in a document filed with a court, even where it is not read at a hearing. LaGrange v. State (1958), 238 Ind. 689, 153 N.E.2d 593; Kerr v. State (1922), 194 Ind. 147, 141 N.E. 308; Coons v. State (1922), 191 Ind. 580, 134 N.E. 194. The concern is for the integrity of courts, not hearings or

judges. Grimm v. State (1959), 240 Ind. 125, 127-28, 162 N.E.2d 454, 456.

Contempt of court involves disobedience of a court which undermines the court's authority, justice, and dignity. Any act related to a current or pending proceeding which tends to deter the court from the performance of its duties may support a contempt proceeding. Any act which manifests a disrespect and defiance of a court may constitute direct criminal contempt. Brumbaugh v. State (1986), Ind., 491 N.E.2d 983, 984; In re Nasser (1994), Ind.App., 627 N.E.2d 1338, 1340-41. See also Turquette v. State (1927), 178 Ark. 875, 298 S.W. 15 (striking a judge because of adverse ruling supports a summary proceeding for criminal contempt, even when the altercation occurs in another jurisdiction; Mitchell v. State (1990), 320 Md. 756, 580 A.2d 196 (making an obscene gesture after a sen-

tencing hearing is direct criminal contempt); Jackson v. Bailey (1992), 221 Conn. 498, 605 A.2d 1350 (uttering an obscenity after a bond reduction hearing is direct criminal contempt). Appellant's activities certainly manifested the requisite disrespect.

In summation, where, as here, the court has firsthand and immediate knowledge of acts demonstrating a clear disregard for its authority which threaten to undermine the integrity of the judicial process and impede the performance of court work, summary proceedings for direct criminal contempt are available. We do not seek to ascertain the presence of a formal hearing but merely that the inappropriate behavior bears a close relationship to the court's judicial activities. Appellant had come to the courthouse to schedule small claims cases, the judge was working on other le-

gal matters, and the secretary was trying to organize the docket. Appellant's outburst interrupted these activities, called into question the integrity of the process, and manifested disrespect and disobedience towards the court, which properly subjected him to direct criminal contempt proceedings.

II

Appellant claims that the Court of Appeals erred in finding that Appellant had waived his claim that his sentences were excessive. Appellant confuses ability with obligation. Appellant raised this issue in his brief to the Court of Appeals, then failed to provide argument or authority to support his contentions. It is true that an Indiana appellate court <u>can</u> consider a claim even when the issue is not properly raised in an initial brief. <u>Ward v. State</u> (1991), Ind.,

567 N.E.2d 85, 86. However, it is clear that no appellate court in Indiana is required to consider such claims. Everroad v. State (1991), Ind., 571 N.E.2d 1240, 1246.

Appellant also claims that the Court of Appeals erred by not reviewing his sentence. Ind. Appellate Rule 17. Review of sentences is available on appeal but may be waived if not argued. Everroad, 571 N.E.2d at 1246. Appellant failed to produce such argument and the Court of Appeals properly treated it as waived.[2]

Even if this issue had not been waived, the sentence must be manifestly unreasonable if this Court is to modify it. Johnson v. State (1983), Ind., 455 N.E.2d 897, 902. In order to find a sentence manifestly unreasonable we must de-

[2]It is possible that the Court of Appeals did review Appellant's sentences and denied relief without comment.

termine that no reasonable person could find the sentence appropriate given the particular offense and character of the offender. Clay v. State (1981), 275 Ind. 256, 260, 416 N.E.2d 842, 844-845. A term of sixty (60) days is not manifestly unreasonable for two (2) counts of direct criminal contempt. "Punishment for contempt is generally a matter left to the sound discretion of the trial court. . . ." Davis v. Sponhauer (1991), Ind. App., 574 N.E.2d 292, 302. We leave it there.

CONCLUSION

Transfer is granted, the decision of the Court of Appeals is vacated, and this cause is remanded to the trial court to order Appellant incarcerated for the remainder of his sentence.

SHEPARD, C.J., GIVAN and DICKSON, JJ., concur.

SULLIVAN, J., dissenting, would adopt the opinion of Riley, J., in the Court of Appeals in this case. 627 N.E.2d 875, 878 (Riley, J., dissenting).

OPINION OF THE COURT OF APPEALS
OF INDIANA

Frank HOPPING, Appellant-Defendant,

v.

STATE of Indiana, Appellee-Plaintiff.

No. 15A04-9307-CR-264

Court of Appeals of Indiana,
First District

Jan. 31, 1994.

At approximately 11:00 a.m. on July 8, 1993, Hopping entered the Dearborn County Court office seeking to file seven small claims complaints. Hopping, a seventy-one-year-old business man [sic], wanted to have his cases set for hearing all on the same day. However, bailiff Patricia Ritzmann informed Hopping that because his cases involved landlord-tenant disputes they were considered contested and thus, only one could be set per day. When Hopping demanded that his cases all be set for the same day, Ritzmann asked Judge G. Michael Witte, who was in his chambers working on other court matters, whether Hopping's cases

could be scheduled on the same day. Judge Witte answered in the negative affirming the court's scheduling policy to set only one contested case per afternoon and to set multiple cases only if they were uncontested.

When Ritzmann informed Hopping of Judge Witte's response, he became defiant, belligerent, loud, boisterous, obnoxious, and uncontrollable, insisting that his cases be heard on the same date. Upon hearing Hopping verbally abuse court personnel, Judge Witte explained the court's scheduling policy to Hopping himself. Thereafter, Hopping was asked to leave but refused and began verbally assaulting Judge Witte. Hopping threatened to publish an advertisement in the newspaper alleging Judge Witte was a drug user and a drug dealer and that court personnel treated him unfairly.

Interpreting Hopping's allegations as an attack upon the integrity of the judge and the court and as an attempt to intimidate the court into scheduling his cases as he demanded, Judge Witte ordered Hopping under arrest for contempt of court and ordered him into the courtroom. Hopping went into the courtroom, but quickly exited informing Judge Witte that he was a busy man with more important things to do. Hopping ignored Judge Witte's repeated orders to return to the courtroom.

When Deputy Sheriff Michael Horton arrived, he escorted Hopping back into the courtroom. At approximately 11:10 a.m., Judge Witte held a contempt hearing advising Hopping that he was being held in direct criminal contempt for his verbal abuse attacking the reputation and integrity of the court and Judge Witte, his attempts to intimidate court person-

nel into scheduling his cases as he saw fit, and his failure to follow the judge's orders. Hopping denied the allegations. Judge Witte found Hopping guilty and sentenced him to thirty days in the Dearborn County Jail.

As Deputy Horton led Hopping out of the courtroom, he exclaimed "[w]ell, I had a lot of friends killed in World War II by the Japanese. It might've been some of [Judge Witte's] relation, you don't know." Record at 44-45. Judge Witte, who is of Japanese-American descent, ordered Hopping to have a seat in the courtroom for another contempt hearing based upon these comments. When Judge Witte gave him an opportunity to respond, retract, or apologize, Hopping denied making the statements. Judge Witte then found Hopping guilty of a second count of direct criminal contempt. Judge Witte sentenced Hopping to thirty

days in jail to be served consecutively to the thirty days imposed for his first conviction.

Hopping was taken into custody immediately by Deputy Horton. He was incarcerated in the Dearborn County Jail on July 8, 1993. On July 16, 1993, Judge Witte denied Hopping's request to be released on bail pending his appeal. However, on July 22, 1993, this court granted Hopping's request to be released on bail pending appeal.

DISCUSSION AND DECISION

Hopping challenges both contempt convictions. In cases of direct contempt we accept as true the statement entered of record by the trial court of the conduct constituting the contempt. Russell v. State (1981), Ind.App., 428 N.E.2d 1271, 1274. However, we will examine the record, if necessary, to determine wheth-

er the conduct alleged to be contemptuous does, in fact, constitute contempt. Id. We will not interfere with the trial court's judgment unless it appears that the judgment is wrong. Id.

Specifically, Hopping contends that his actions did not disrupt a court proceeding as required by IND.CODE 34-4-7-1. I.C. 34-4-7-1 provides that any person who disturbs the business and proceedings of a court shall be deemed guilty of direct contempt. However, statutory definitions of what constitutes direct criminal contempt are not all-inclusive, but merely recognize the court's power to cite and punish for contempt. Skolnick v. State (1979), 180 Ind.App. 253, 388 N.E.2d 1156, 1162, cert. denied, 445 U.S. 906, 100 S.Ct. 1085, 63 L.Ed.2d 323 (1980). Courts have the inherent power to determine what other acts or conduct may constitute direct or indirect

contempt. Andrews v. State (1987), Ind.App., 505 N.E.2d 815, 830.

Although direct contempt usually refers to conduct directly interfering with court proceedings while court is in session, it includes any act committed in the presence of and with knowledge of the court which manifests a disrespect for and defiance of a court. Skolnick, 388 N.E.2d at 1162-63. Direct contempt may result from an act committed within the personal knowledge of the judge, even though it does not disrupt a court proceeding. See Andrews, at 831 (defendant held in direct criminal contempt for violating judge's order to remain in the courtroom after proceeding had ended where the judge returned to find defendant had left).

In the present case, Hopping became defiant, belligerent, obnoxious, and uncontrollable with Judge Witte and his

staff when they informed him that it was against court policy to schedule cases in the manner in which he demanded. He refused to comply with Judge Witte's orders. He then mounted a scurrilous ancestral attack on Judge Witte. Hopping's actions were committed in the presence of and with the knowledge of Judge Witte. Hopping attacked the integrity of the court and attempted to intimidate court personnel. His actions disrupted court personnel preventing them from conducting any other court activity. Moreover, Hopping's conduct showed a blatant disrespect for and defiance of the court. Judge Witte correctly held Hopping in direct criminal contempt for this contemptuous behavior.

Judge affirmed and remanded to the trial court to order Hopping incarcerated to serve the remainder of his sentence.

ROBERTSON, J., concurs.

RILEY, J., dissents with separate opinion.

RILEY, Judge, dissenting.

I respectfully dissent. While the majority has correctly said that a person who "would mount a scurrilous ancestral attack on a judge and verbally abuse court personnel" would be engaging in contemptuous conduct, that particular conduct should not be considered direct criminal contempt of the court. At the time Hopping was held in direct criminal contempt, there was no scheduled hearing, he was not in the courtroom, and the court was not in session. Thus, the judgment of guilt for direct contempt was not supported by the facts and should be reversed.

Direct contempt usually refers to conduct directly interfering with court proceedings while court is in session. IND.CODE 34-4-7-1 and I.C. 34-4-7-2.

Such conduct must generally take place in or immediately adjacent to the courtroom, while court is in session, so that the judge has personal knowledge of such conduct in his official capacity. LaGrange v. State (1958), 238 Ind. 689, 153 N.E.2d 593, 596. It could best be described as an act committed in the presence of the court or so near it as to interrupt its proceedings while it is in session. No formal charges are filed and no evidentiary hearing is held in a direct contempt proceeding. The findings must be beyond a reasonable doubt.

Indirect contempt is the willful disobedience of any lawfully entered court order of which the offender has notice. I.C. 34-4-7-3. Indirect contempt arises from conduct not occurring in the presence of the court, such as failure of a party to obey a court order or process, whereas direct contempt is committed in

the immediate view or presence of the court. Hegedus v. Hegedus (1978), 178 Ind.App. 620, 383 N.E.2d 446, 447. Indirect contempt proceedings are to be filed as independent actions which entitle the accused to notice of the nature and circumstances of the charges against him or her, and an opportunity to show cause why he or she should not be attached and punished. Such proceedings also allow the defendant to be represented by counsel and if a possibility exists that he or she may be incarcerated and he or she is indigent, the court must appoint an attorney. In Re Marriage of Starīha (1987), Ind.App., 509 N.E.2d 1117, 1121.

The first occurrence of contempt occurred when the defendant became verbally abusive with the court personnel and Judge Witte by attempting to intimidate the court and attacking the integrity of

the judge. The defendant had come to the court office to file some pleadings in several small claims actions. He was not there pursuant to a scheduled hearing or other court-ordered process. This incident took place in the court offices and not in the courtroom. This incident did not interrupt any court proceeding nor did it take place in front of the public. The court, because the incident took place outside the court and did not disrupt a court proceeding, should follow the statutory provisions and file a rule to show cause why the defendant should not be attached and punished for his indirect criminal contempt.

The trial judge held a contempt hearing immediately after informing the defendant he was being held in direct contempt of the court for his verbal abuse attacking the reputation and integrity of the court and the judge, his

attempts to intimidate the court personnel into scheduling his case as he saw fit, and his failure to follow the judge's orders. Hopping denied the allegations. This further illustrates the importance of following the procedure for indirect contempt so that the defendant could be heard on the issue and have the benefit of counsel, if he chooses.

As the defendant was being led out of the courtroom by the deputy to begin a sentence of 30 days in the Dearborn County Jail, he was heard to make a remark concerning the Japanese heritage of the judge. Defendant denied making the statement and he was again found guilty of a second count of direct criminal contempt. Again, it is essential that people appearing before the court be given all the procedural protections entitled to one accused of any criminal act.

Direct criminal contempt must be such an open threat to the court that if it is not instantly suppressed the court's authority will be diminished. The threats made by the defendant were not jeopardizing any proceedings nor were they matters that could not have been formally put in writing and set for hearing. Absent a showing that immediate punishment is required to maintain order in and respect for the court, there is no proof of direct contempt. Brennan v. State (1961), 242 Ind. 79, 173 N.E.2d 312, 313. The determination of whether a contempt of court has been committed does not depend upon the alleged intention of the offending party, but on the act. The discretion of power under actions of this kind must be carefully weighed to preserve the rights of its citizens for whose sole benefit the courts were organized. Coons v. State (1922), 191 Ind.

580, 134 N.E. 194, 198. Hopping's actions did not directly interfere with any court proceedings, did not delay any court proceedings, nor bring the court itself into disrepute. I would reverse the judgment of the trial court.

AMENDED JUDGMENT OF CONVICTION

Filed: July 9, 1993
Phillip D. Weaver
Clerk, Dearborn Circuit Court

STATE OF INDIANA

COUNTY OF DEARBORN — IN THE DEARBORN COUNTY COURT

IN RE THE MATTER OF
A DIRECT CRIMINAL CONTEMPT
OF FRANK HOPPING AGAINST
THE DEARBORN COUNTY
COURT — CAUSE NO.
15E01-9307-MC-015

AMENDED JUDGMENT OF CONVICTION

COUNT I

This matter came before the Court at approximately 11:10 a.m. on July 8, 1993, for hearing upon the direct criminal contempt actions of Frank Hopping. The facts are summarized as follows:

1) Contemner appeared in the court office at approximately 11:00 a.m. demanding to have seven (7) potential contested small claims cases set for hearing all on the same afternoon.

2) Contemner was told by court personnel that the court scheduling policy is only one contested case per afternoon, however multiple uncontested collection cases are scheduled per afternoon.

3) Contemner was defiant and belligerent to that answer and disruptive to office decorum. Court personnel instructed contemner that she would ask the judge if his matters could be set all on one day.

4) This judge denied the request because each of the cases appeared to be of a contested nature, and because contemner has appeared frequently in small claims court before this judge both as a plaintiff and as a defendant and none of his cases have been simple or brief. When contemner was advised of this judge's decision, contemner again became boisterous and belligerent with the court personnel and disruptive to normal busi-

ness activity in the court office and to other offices in the courthouse.

5) This judge then personally exited his private office and intervened upon court personnel's behalf to save them from the verbal abuse being spewed by contemner and to address the disruption of court activity caused by contemner's belligerent behavior. Furthermore, this judge intervened to protect female court personnel from possible harm in light of the recent rash of attacks throughout the United States upon judges, court personnel, lawyers, and court participants.

6) Contemner was asked to leave the court's office. Contemner would not leave the office and continued his loud, verbal assault on this judge. Contemner then informed this judge that since he was not getting his way on the scheduling of cases, he would publish an advertise-

ment in the newspaper about his unfair treatment by this judge. Contemner was told by this judge to do so if that was his choice, but to beware of slanderous remarks.

7) Contemner then indicated he would publish that this judge is a drug dealer and that the people of Dearborn County need to know what type of person they have in public office. Contemner's false allegations were an attack upon the integrity of both the judge and the court. Furthermore, this judge interpreted contemner's actions to be a direct act of intimidation and extortion upon this judge in order to have his cases scheduled as contemner sees fit and with total disregard to the scheduling policy of the court and the valid reasons for denying his request.

8) Throughout this dialogue, contemner's actions and voice were loud, boisterous, angry, and agitated.

9) Upon this act of intimidation, this judge acted swiftly with a court hearing due to this judge's personal knowledge and experiences with contemner over the past twelve (12) years as being a person known to engage in false, scurrilous, and scandalous attacks upon the judiciary, as well as government and law enforcement officials of southeast Indiana. The basis for this personal knowledge is this judge's prior representation of contemner in a legal matter; contemner's personal distribution to this judge of a scandal sheet called "The Voice Against Corruption"; contemner's frequent appearance as a litigant in small claims court; contemner's close association with Millard D. Scudder and a radical, subversive group known as the

Citizens Against Corruption; and the fact that contemner's false, scurrilous remarks were quite similar to those made only one week before in a scandalous pleading filed by Millard D. Scudder in cause number 15E01-9306-MC-013, which pleading was stricken from the record and was never available for public viewing.

10) Contemner was directed to have a seat in the courtroom to address his acts of intimidation upon the court.

11) Contemner indicated that he was a busy man and had other more important things to do and that he was leaving.

12) Contemner was again instructed to have a seat in the courtroom, and he replied, "You can't order me to do anything."

13) Contemner was again instructed by this judge to have a seat in the courtroom and he replied, "I'm not under arrest. You can't order me around."

14) Contemner was then instructed by this judge that he was under arrest for contempt of court and again was instructed to have a seat in the courtroom. Contemner replied, "You can send a sheriff to get me. I'm going to the first floor," and then he proceeded towards the elevator.

15) A sheriff's deputy arrived to quell the disturbance and contemner was arrested and taken into the courtroom. Contemner was advised on the record of the alleged contemptuous acts and was given an opportunity to respond, retract or apologize. Contemnor did neither, nor did he give any explanation for his actions or derrogatory comments.

The Court finds Frank Hopping GUILTY of direct criminal contempt of court upon the first count for the following reasons:

1) Failing to abide by the judge's command to leave the court office, and failing to be seated in the courtroom after having been commanded to do so after being placed under arrest.

2) Attempting to have his cases scheduled upon the court calendar as he wishes through acts of intimidation and extortion which included false, scurrilous, and scandalous attacks upon the integrity of the judge and the Court.

3) Disrupting the administration of court work and creating a situation of safety concerns to the personnel of the court.

Contemner is sentenced to a period of incarceration in the Dearborn County Jail of thirty (30) days.

COUNT II

This matter came before the Court at approximately 11:20 a.m., July 8, 1993,

for hearing upon a second count of direct criminal contempt committed by Frank Hopping. The facts supporting this contempt are summarized as follows:

1) While being led from the courtroom by a sheriff's deputy after having been found guilty of a direct criminal contempt of court as summarized in Count I, and while still on record in open court and in the presence of this judge, contemner made the following statement. "I had a lot of friends killed in World War Two by the Japanese. Might have been some of his relation."

2) This judge is of Japanese-American descent.

3) Contemner was advised on the record of the alleged contemptuous act and was given an opportunity to respond, retract, or apologize. Contemner denied making the statement. The transcript of the proceedings contradicts his denial.

The Court finds Frank Hopping GUILTY of direct criminal contempt of court upon a second count for the reason that contemner's actions were a prejudiced and racist attack upon the ethnic heritage of this judge; showed lack of respect towards the tribunal in the courtroom; was a breach of courtroom decorum; and was a direct attack upon the integrity of the judge and the court.

Contemner is sentenced to a period of incarceration in the Dearborn County Jail of thirty (30) days to run consecutive to the sentence imposed on Count I.

Contemner is remanded to the custody of the sheriff for execution of sentence.

SO ORDERED THIS 9TH DAY OF JULY, 1993, AT LAWRENCEBURG, INDIANA.

G. Michael Witte
HON. G. MICHAEL WITTE
JUDGE, DEARBORN COUNTY COURT

cc: Defendant
Sheriff
William Pfister

EXCERPTS FROM MEMORANDUM OF LAW IN SUPPORT OF EXCEPTION TO JUDGMENT AND MOTION TO RECONSIDER AND CORRECT ERROR AND TO RESCIND AND VACATE JUDGMENT AND MOTION FOR NEW TRIAL

II

In McIntire v State (1967) 223 N.E.2d 347 at 349 the Supreme Court in reversing the Trial Court, said:

> "Although the court, in its inherent power under direct contempt, is not necessarily limited to the wording of the statute, we have held in opinions that direct contempt deals primarily with the maintenance of order and respect in the courtroom, and to such areas adjacent thereto as are necessary for control for such purposes. We have even held that although some act may take place in the courtroom, if it is done privately and without the knowledge of the court and in no way interferes at the time with the maintenance of order, such act would not necessarily be an act of direct contempt.
>
> ". . . The acts here charged, without question, are reprehensible and reflect upon the judge and judicial proceedings, and we can well understand the presiding judge's indignation arising from such an incident. <u>However, there are other ways and means of prosecuting such charges under which a person so charged is not compelled to be tried by one so vitally and directly interested in the pro-</u>

ceedings, as the judge in the case of direct contempt. Due process and justice require a distinction." (emphasis provided) [in original].

* * * * * * *

V

In Johnson v State (1981) 426 N.E.2d 104 at 106 the Court of Appeals Third District, in reversing the Trial Court, said:

> "Due process requires that a neutral and detached magistrate preside over the contempt proceedings after the trial has been concluded. We agree.
>
> "Direct contempt is any act which manifests a disrespect for and defiance of a court. It must be committed in the presence of and with knowledge of the Court. If McDowell did violate the order in limine during the jury trial his conduct could constitute direct contempt of court.
>
> "Direct contempt of court has long been dealt with summarily. Contempt powers are necessary to protect the orderly administration of justice and maintain the authority and dignity of the court. The trial court may act summarily because the immediate vindication of these interests outweighs the need for a completely neutral and detached magistrate to decide if a party

should be held in contempt of court.

"After the state made its motion that McDowell be found in contempt of court, Judge Letsinger set the motion down for a hearing at the conclusion of Johnson's trial. There was no immediate need to protect the orderly administration of justice or to maintain the authority and dignity of the court. If the need had existed, Judge Letsinger could have cited McDowell for contempt. It was clearly within his power and discretion to take such action where the circumstances clearly warranted it. But, he did not.

"Where the need to protect the orderly administration of justice or to maintain the authority and dignity of the court do not exist, due process requires that a completely neutral and detached magistrate preside at the contempt hearing. Justice is better served because there will be neither the likelihood of bias nor the appearance of bias when the judge who accused the party of contempt disqualified himself from presiding at the contempt hearing." (emphasis provided) [in original].

STATEMENT OF THE ISSUES PRESENTED
FOR APPEAL, FROM APPELLANT'S
SECOND AMENDED BRIEF BEFORE THE
COURT OF APPEALS OF INDIANA

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Defendant was denied a fair trial due to the irregularity of the proceedings held by the Court as more particularly set forth in Defendant's verified response to the written charges filed against him on July 9, 1993. (TR 17)

B. Defendant was denied his right to due process by Judge Witte's erroneously classifying Defendants' alleged actions in Count I and Count II as Direct Contempt when in fact the very most they could have been was Indirect Contempt for the reason that at the time of the alleged acts the Court was not in session and said alleged acts could not interfere with or disturb proceedings of the Court.

C. Defendant was surprised and entraped [sic] by the actions and words of Judge Witte.

D. The judgment is not supported by sufficient evidence upon all the necessary elements of Direct Contempt, particularly, but not limited to, the requirement that Defendant's alleged actions disturbed the proceedings of the Court.

E. The Judgment in Count I is contrary to the evidence in that all evidence is to the effect the Court was not in session at the time of the alleged acts so there were no proceedings to disturb.

F. The Judgment in Count II is contrary to the evidence in that all the evidence is to the effect that the Court was not in session at the time of alleged statement. There was no proceeding disturbed. Further the statement attributed to Defendant, though conceivably offensive to the sensibilities of the Judge,

did not interfere with, impede or disturb the administration of justice.

G. The conclusions of law entered by Judge Witte are erroneous, contrary to the law and are not supported by the evidence in that all evidence is to the effect that Court was not in session and there were no proceedings in progress with which Defendant could or did interfere or disturb.

H. The Trial Court did not have the power to punish a person for Direct Contempt where the act allegedly constituting the Direct Contempt occurred at a time and place where it did not interfere with a Judicial proceeding.

I. To constitute Direct Contempt the act must not only interfere with the Court's "Business" but also a Court "Proceeding".

J. The Court's power to summarily punish for Direct Contempt must yield to

a citizen's Constitutional right to due process unless there is a pressing need otherwise.

K. The sentence imposed in the case at bar is manifestly unreasonable in light of the nature of the alleged offense and the character of the Defendant.

L. A person charged and summarily convicted of an alleged Direct Contempt is entitled to be released on bail bond while he exhausts his rights of appeal.